STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PACIFIC MUSHROOM FARM a division of CAMPBELL SOUP COMPANY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 78-CE-67-M 78-CE-67-1-M 78-CE-137-M 7 ALRB No. 28

DECISION AND ORDER

On August 31, 1979, Administrative Law Officer (ALO) Robert A. D'Isidoro issued the attached Decision in this proceeding. Thereafter, the General Counsel and Charging Party each filed timely exceptions with a supporting brief and Respondent filed a brief in opposition to their exceptions.

Pursuant to Labor Code section 1146, the Board has delegated its authority to a three member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the ALO's rulings, findings, and conclusions, as modified herein, and to adopt his recommended order, with modifications.

Many of General Counsel's exceptions relate to the allegation that Respondent engaged in bad-faith or "surface" bargaining with no intent to reach agreement. The record evidence in this case shows that Respondent complied in a reasonable manner with the UFW's requests for information, made concessions on

major issues, and signed a collective-bargaining contract in November 1978. As we find no merit in the aforesaid exceptions, we affirm the ALO's conclusion than although Respondent engaged in hard bargaining, it did not thereby violate section 1153(e) and (a) of the Act.

General Counsel excepts to the ALO's conclusion that Respondent did not violate the Act by increasing the wages of its employees on or about August 26, 1978. We find merit in this exception. Respondent increased the wage rates without bargaining to impasse or agreement with the United Farm Workers of America (UFW) about the matter. Such unilateral changes in working conditions are considered per se violations of Labor Code section 1153(e) and (a). McFarland Rose Production (April 18, 1980) 6 ALRB No. 18. Even where an employer has otherwise bargained in good faith, its unilateral change in wages is "...a violation of section 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of section 8(a)(5) much as does a flat refusal [to bargain on that subject]." MLRB v. Katz (1962) 369 US 736 [50 LRRM 2177].

Moreover, since the employer's duty to bargain continues during a strike, a unilateral wage increase granted to nonstrikers is both a refusal to bargain under section 1153 (e) and an illegal discrimination under section 1153 (c), as the increase is inherently destructive of the employees' right to engage in concerted union activity. Burlington Homes, Inc. (1979) 246 NLRB No. 165 [103 LRRM 1116]; Soule Glass and Glazing Co. (1979) 246 NLRB No. 135 [102 LRRM 1693], Respondent here has made such unilateral changes and,

having failed to establish a business justification which outweighs the destructive effect on employee rights, Respondent has violated sections 1153 (e), (c), and (a). See Elmac Corp. (1976) 225 NLRB 1185 [93 LRRM 1285].

Respondent here argues that the increase was permissible because the negotiations had reached an impasse, making further discussion futile. It has been held that an impasse suspends the duty to bargain and permits an employer to act unilaterally for so long as the impasse exists. NLRB v. Tex-Tan, Inc. (5th Cir. 1963) 318 F.2d 472 [53 LRRM 2298]. However, the impasse must be genuine, that is, all prospects of concluding an agreement through good faith negotiation must have been exhausted.

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining exists. Taft Broadcasting Co. (1967) 163 NLRB 475, 478 [64 LRRM 1386].

Our examination of the record, in light of the above-listed factors, convinces us that the ALO erred in concluding that the parties were at impasse.

Although the parties had met numerous times between January and August, 1978, many major issues remained unresolved. Moreover, Respondent's own letters to its employees during the strike indicate a willingness to make further concessions in the area of wages and other economic benefits. As a general rule, contract negotiations are not at impasse if the parties still have

room for movement on major contract items, even if the parties are deadlocked in some areas. Schuck Component Systems (1977) 230 NLRB 838 [95 LRRM 1607; Chambers Manufacturing Corporation (1959) 124 NLRB 721 [44 LRRM 1477], enf'd. (5th Cir. 1960) 278 F.2d 715 [46 LRRM 2316]. Continued negotiations in areas of concern where there is still room for movement may serve to loosen the deadlock in other areas.

The ALO found that the Union and Respondent had a "contemporaneous understanding" as to the existence of an impasse, based on the Union's walk-out at the August 23, 1978, meeting and the lack of communication as to the next meeting date. We disagree. The Union walk-out and subsequent strike are not evidence of impasse. Rather, such activity is merely an attempt by one party to increase its bargaining power in the negotiations. J. H. Bonck Co. (1968) 170 NLRB 1471 [69 LRRM 1172].

We also reject the ALO's conclusion that the wage increase was justified as consistent with a past practice of such increases. As we stated in Kaplan's Fruit and Produce Co. (July 1, 1980) 6 ALRB No. 36, a past practice of wage increases will create an exception to the prohibition against unilateral changes only where the increase is non-discretionary and fixed in time and amount. The facts here indicate no more than a discretionary periodic increase.

The ALO also found that a letter from Respondent to the striking employees, dated September 5, 1978, was permissible as a response to employee requests for information as to the status of the negotiations. We find merit in General Counsel's exception to that finding. The letter clearly offered the employees a wage

increase if they would abandon the strike and return to work. We conclude that Respondent's letter constituted direct bargaining with the employees, bypassing the exclusive bargaining representative, and that Respondent has thereby violated Labor Code section 1153(e) and (a). Masaji Eto (April 25, 1980) 6 ALRB Mo. 20, enf'd in part by Ct.App. Fifth Dist., 5 Civ. No. 5658 (Jul. 27, 1981); J. H. Bonck Co., supra, 170 NLRB 1471.

General Counsel also excepts to the ALO's finding that Respondent's changes in its camp rules and vacation policy were reasonable and necessary to keep the company in operation during the strike. We find merit in the exceptions regarding free room and board for non-strikers and change in vacation policy.[1/]

While other changes were legitimately aimed at keeping peace among strikers and non-strikers living in the camp, the grant of free room and board to non-strikers is purely an economic benefit and an inducement to strikers to abandon the strike. As the policy is discriminatory against strikers on its face, we find that Respondent's conduct was inherently destructive of employee rights protected by section 1152 and therefore violates section 1153(c) and (a). Burlington Homes, Inc., supra, 246 NLRB No. 165. Moreover, since this change was implemented without notice to or negotiation with the Union, it also violates section 1153(e) and (a). See O'Land, Inc. (1973) 206 NLRB 210 [84 LRRM 1378].

As to the vacation policy, Respondent's practice was to

[1/]Member Waldie would find that Respondent's ban of all visitors to its labor camp is a violation of section 1153 (a). Merzoian Bros Farm Management Co., Inc. (July 29, 1977) 3 ALRB No. 63; U.F.W. v. Superior Court (Buak Fruit Co.) (1975) 14 Cal. 3d 902.

give either time off or a lump-sum payment on the anniversary of employee's date of hire. Respondent admitted that its employees had been allowed to take prorated vacation pay if they left Respondent's employ prior to their anniversary dates. Respondent also conceded that an employee had once been given vacation pay despite the fact that he would be on a leave of absence when his anniversary date occurred. After August 28, however, Respondent refused to pay vacation benefits to strikers, on the theory that the strikers were not on the active payroll and only active employees could receive vacation pay.

We reject the ALO's finding that Respondent's policy on vacation pay after August 28 was unchanged. The ALO disregards the above-stated facts, which demonstrate that other categories of employees, that is, those who terminated their employment and those on leave, were given vacation pay prior to their anniversary date, without being on the active payroll. While an employer is entitled to continue a consistent and non-discriminatory past practice in the area of vacation pay, it may not create a more restrictive policy for strikers. Elmac Corp., supra, 225 NLRB 1185.

Such a unilateral change in working conditions constitutes a per se violation of section 1153 (e) and (a) because it is tantamount to a flat refusal to bargain about vacation-pay policies, and is also a violation of section 1153 (c) and (a) in that it discriminates against striking employees for engaging in protected activities. Thus, delaying or eliminating employees' vacation benefits tends to discourage them from joining or supporting the Union and the strike and therefore is inherently

destructive of section 1152 rights. Burlington Homes, Inc., supra, 246 NLRB No. 165, and NLRB v. Knuth Bros., Inc. (7th Cir. 1978) 584 F.2d 813 [99 LRRM 2784]. The burden is therefore on the employer to show a legitimate and substantial business justification for the discrimination. Respondent alleges that the discrimination is justified because an employee normally risks economic losses by going on strike. This, however, is not a sufficient justification, since the potential damage to section 1152 rights is great in this setting. Elmac Corp., supra, 225 NLRB 1185. We therefore conclude that Respondent's unilateral changes with respect to its vacation policy as applied to strikers violated section 1153(e), (c), and (a) of the Act.

Remedy

Based on the totality of the record evidence, we have found that Respondent has not acted in bad faith by its overall conduct in the course of collective bargaining negotiations. However, we have concluded that Respondent violated section 1153(e), (c), and (a) of the Act by its changes in wages and other working conditions. Accordingly we shall order Respondent to rescind, upon the UFW's request, its August 26, 1978, unilateral wage increase and its unilateral changes as to vacation pay for strikers and room and board for non-striking employees, and also to reimburse its employees for economic losses they have suffered as a result of the aforesaid unilateral changes. We shall also order Respondent to meet and bargain with the UFW, on request, over any proposed changes in those terms of employment.

We stress, however, that these post-adjudication remedies

are often inadequate. See Agricultural Labor Relations Bd. v. Ruline Nursery Co. (1981) 115 Cal.App.3d 1005, 1015-17. In a strike situation, a unilateral wage increase can immediately dilute the union's economic power as replacement workers are recruited to work at the illegally-raised rates. Therefore, in order to prevent an employer from gaining an unfair advantage during a strike, the status quo at the time the strike began must be maintained. As this Board is not empowered to enjoin unlawful unilateral wage increases in strike situations, injunctions must be sought in the Superior Courts pursuant to Labor Code section 1160.4. The inherent delay in applying the Board's remedial power and the dynamics of the collective bargaining process should be considered in actions for injunctive relief in cases of this type.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders Respondent Pacific Mushroom Farm, a division of Campbell Soup Company, its officers, agents, successors, and assigns to:

1. Cease and desist from:

(a) Unilaterally changing any of its employees' wages, or any other term or condition of their employment, without first notifying and affording the United Farm Workers of America, AFL-CIO (UFW) a reasonable opportunity to bargain with respect thereto.

(b) Dealing directly with its employees concerning their wages, hours of work, or any other term or condition of their employment.

(c) Discriminating against any of its employees for engaging in any union activity or other protected concerted activity by making any unilateral changes in their wages, hours, or working conditions.

(d) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of those rights guaranteed by Labor Code section 1152.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Upon request, meet and bargain collectively with the UFW, as the certified exclusive collective bargaining representative of its agricultural employees, concerning the unilateral changes heretofore made in its employees' wage rates, its vacation policy, and its room-and-board policy.

(b) If the UFW so requests, rescind the unilateral changes in wage rates, vacation policy, and room-and-board policy made by Respondent on or about August 27, 1978.

(c) Make whole its employees for any economic losses suffered as a result of the unilateral changes in working conditions made on or about August 26, 1978, and described above in paragraph 2(b).

(d) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Post copies of the attached Notice in conspicuous places on its property for a 60-day period, the period and place(s)

of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any Notice which may be altered, defaced, covered, or removed during the period of posting.

(f) Provide a copy of the attached Notice to each employee hired during the 12-month period following the date of issuance of this Order.

(g) Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of issuance of this Order to all Respondent's agricultural employees employed at any time during the payroll periods immediately preceding and following August 26, 1978.

(h) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice in appropriate languages to the assembled employees of Respondent on company time. The reading or readings shall be at such time(s) and places(s) as are specified by the Regional Director. Following the reading(s), the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(i) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps which have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically

thereafter in writing of further actions taken to comply with this Order.

Dated: September 22, 1981

HERBERT A. PERRY, Acting Chairman

JEROME R. WALDIE, Board Member

MEMBER McCARTHY, Concurring and Dissenting:

I agree that denying only strikers accrued vacation pay constitutes a violation of Labor Code section 1153(c) and (a). NLRB v. Great Dane Trailers, Inc. (1967) 388 U.S. 26 [65 LRRM 2465].[1/] However, I would dismiss all the remaining allegations in the complaint. The majority's failure to do so subjects employers to a "damned-if-you-do, damned-if-you-don't" rule concerning nondiscretionary wage increases and incurable uncertainty with regard to permissible responses to strike violence.

I. WAGE INCREASE

By a disturbing distortion of law and fact, the majority

[1/] I also agree that there was insufficient evidence to establish the General Counsel's "surface bargaining" allegation. It is particularly troubling to me that this allegation was not dismissed after an agreement was reached. The signing of a contract certainly indicates a good faith attitude at some point by both parties. It is difficult to understand why the General Counsel continued to litigate this matter for thirty-five hearing days after the signing of the contract.

finds that Respondent increased wages without notice to or bargaining with the UFW. The undisputed testimony of both union and employer witnesses, however, was that the union had been told at least by early May that Respondent intended to continue its established past practice of an annual wage increase. The sane witnesses also testified that the issue was a subject of bargaining in July.

The majority correctly identifies the factors to be considered in determining the existence of an impasse. Taft Broadcasting Co. (1967) 163 NLRB 475, 478 [64 LRRM 1386]. It then fails to adequately apply those factors. For example, the majority rejects the ALO's finding that the parties had a contemporaneous understanding as to the existence of an impasse by noting that a strike is not evidence of an impasse. That is a non sequitur. Both union and company officials testified that progress was impossible.[2/] Moreover, the majority finds that there was room for movement without recognizing that such a finding necessarily presumes the opportunity for movement. But here, because the UFW walked out on negotiations and failed to respond to Respondent's attempt to resume discussions, there was no such opportunity. At any rate, as shown below, the wage increase in question falls safely within both the letter and spirit of the well-established exception to the prohibition against unilateral changes in working conditions. It is thus unnecessary to determine whether the increase was

---

[2/] The union negotiator, Marilyn Steeg, also testified on two occasions that she told Respondent that, if there were any change in the UFW's bargaining position, the union would be in touch.

justified by the existence of an impasse in negotiations.

As a general rule, an employer may not unilaterally implement a wage increase without first notifying and bargaining with its employees' representative, unless such an increase is in keeping with the employer's past practice of regular, nondiscretionary increases. NLRB v. Katz (1969) 369 U.S. 736 [59 LRRM 2177]. The rationale behind the prohibition of a discretionary increase is two-fold: the union has no way of knowing whether the increase constitutes a substantial departure from past practice; and such an increase tends to interfere with the process of bargaining by virtue of its coercive effect on employees. NLRB v. Patent Trader, Inc. (2d Cir. 1969) 415 F.2d 190 [71 LRRM 3086], mod. (1970) 426 P.2d 791 [74 LRRM 2284]. The exception for regular, nondiscretionary increases is consistent with this reasoning: since the amount and timing of the raises is more or less set, the union certainly will be able to determine whether there has been any deviation from this past practice, as well as the substantiality of that deviation; and, since the employees expect such an increase at that time, its effect could hardly be said to be coercive.

In the case at hand, the union admittedly had been aware since early May of Respondent's practice of an annual wage hike, as well as its announced intention to continue that practice. Yet at no time did the union raise any objection. As the ALO found, the 25 cent increase was very close to the average of the wage increases granted the previous two years, and in light of the fact that only a 25 cent increase had been offered during negotiations, granting a greater increase would have been violative of section 1153 (e).

NLRB v. Katz, supra. Similarly, given Respondent's established past practice, to have granted no increase would have amounted to an unlawful unilateral change, in violation of section 1153(e), and (a) of the Act. Russel Stover Candies, Inc. (1975) 221 NLRB 441 [90 LRRM 1583]; see Jimmy Dean Meat Co. (1977) 227 NLRB 1012 [94 LRRM 1414].

Finally, it is difficult to see how the increase in question could either tend to coerce the workers or otherwise interfere with the bargaining process. Given the past practice of an annual wage increase, the workers could only have been expecting such a raise; and since the union had walked out of negotiations there was no bargaining process to be disrupted. See NLRB v. Patent Trader, Inc., supra, at pp. 199-200.

Not one of the cases cited by the majority is on point. In Kaplan Fruit & Produce Co. (1980) 6 ALRB No. 36, increases were granted only after employee requests, subject to employer refusal, and in an amount fixed by the employer's sense of the prevailing wage rate. Here, unlike Kaplan, there was every "opportunity to negotiate prior to implementation", and "the possibility of union input", far from being "foreclosed", was encouraged, even after the Ranch Committee walked out of negotiations on August 23. In McFarland Rose Production (1980) 6 ALRB No. 18, we held, in the context of overall employer bad-faith bargaining, that the employer violated the ALRA by implementing new bonus and incentive plans without adequate notice to or bargaining with the UFW. Unlike the instant case, that case involved neither a bargaining impasse nor a past practice of periodic, nondiscretionary changes in those plans.

Finally, both Burlington Homes, Inc. (1979) 246 NLRB Mo. 165 [103 LRRM 1116] and Soule Glass and Glazing Co. (1979) 246 NLRB No. 135 [102 LRRM 1693] involved the unilateral granting of a wage increase in an amount greater than that offered to the union during negotiations. Again the amount granted by Respondent here was precisely the amount offered at the bargaining table.

In sum, neither the facts nor the law support the majority's position.

II. LETTER TO EMPLOYEES

Astonishingly, the majority finds the Zoliniak letter of September 5, written in response to employee inquiries, to be an attempt to circumvent the exclusive bargaining representative and deal directly with employees. The letter, reprinted in full below, speaks for itself.

"My Esteemed Friends:

Many of you have asked us about the strike and about returning to work. We feel this strike is needless and brings unnecessary hardship to you and your family.

We want to make certain you have the facts so you can form your own ideas;

FACT # l - Your Company offered in negotiations with the Union, wage increases for you of 25 cents an hour.

FACT #2 - Your Company also proposed to add the 30 cent an hour housing allowance to all employees' base rates. For an employee who is not a head of household and living off the Farm, this, combined with the 25 cent wage increase, would mean a total increase of 55 cents an hour.

FACT #3 - Your Company offered to increase payments for childbirth to $700 (was $450).

FACT #4 - We also proposed to make the $50 deductible expenses under Major Medical insurance apply to the whole covered family instead of for each individual.

FACT # 5 - We responded in writing to many of the proposals by the Union for contract language, including a standard grievance procedure/ union dues check-off and union security.

FACT #6 - Your Company could not agree to some of the Union's proposals because they would take away the Company's ability to manage the Farm.

We also told the Union bargaining committee members that these proposals of the Union were not of general benefit to you. For instance, the Union wants to be the only judge of your "good standing" in the Union and whether you should continue to have a job. That is not right for you or your Company.

Some of you have told us you want to return to work. Jobs are available for you. We want you to know that anyone who comes back will be paid the higher rates of pay which already have been offered at negotiations.

If you have questions, we ask you to call telephone number 879-0262 any day 10 a.m. to Noon or 6 p.m. to 8 p.m.

Sincerely,
[Signed]
E. E. Zoliniak, Manager
Pacific Mushroom Farms."

As in NLRB v. General Electric Co. (2d Cir. 1969) 418 F.2d 736 [32 LRRM 2530],

> "A fair reading of the brief missive . . . fails to disclose that it had anything more than an informational purpose, giving the content of the proposal made . . . previously. The basic distinction is between attempting to reach a separate settlement with the [employees] . . . and keeping them informed of Company positions. In circumstances such as these, the interest in free speech and informed choice must prevail over the slight possibility that the representative's position might be undermined . . . ." At page 756.

The letter merely informs those employees who are on strike that, when they return to work they will receive "the higher rate of pay" already lawfully granted to nonstrikers. This is to say nothing more than that the strikers will not be discriminated against for participating in the strike.

Once again, the cases cited by the majority are totally

inapposite. Masaii Eto (1980) 6 ALRB No. 20 concerned direct negotiations between the employer and one of his thinning crews as to whether employees would be paid on a contract basis or by the hour. And J. H. Bonck Co. (1968) 170 NLRB 1471 [69 LRRM 1172] involved an unsolicited communication from the employer to his employees in which he, inter alia, specifically urged them to abandon their certified bargaining representative and to deal with him directly. Neither of these situations is present here.

III. BENEFITS TO NONSTRIKERS

The majority overlooks the fact that an employer may grant returning strikers temporary economic benefits where those benefits are related to potential personal and property damages created by the strike situation. Pilot Freight Carriers, Inc. (1976) 223 NLRB 286 [91 LRRM 1005], With little or no analysis, the majority seems to hold that such a grant of benefits is always a violation. That is not the law.

The first striker to return to work was threatened and had his clothes splattered with paint, in response to which Respondent had him moved to other housing. In return for this inconvenience, and in response to threats directed at other employees, Respondent decided that this alternative housing and food service would be provided to all nonstrikers without charge. When other strikers inquired as to what protection they would receive if they returned to work, they were informed of management's decision. This was hardly an "offer" of economic benefit. Rather, it was reasonable response designed to protect returning workers from actual and threatened violence.

Yet again, the cases cited by the majority have nothing to do with the present one. In O'Land, Inc. (1973) 206 NLRB 210 [84 LRRM 1378], a unilateral change in company rules concerning meals were found to be an unfair labor practice. However, no strike was involved. And in Burlington Homes, Inc., supra, 246 NLRB No. 165 the employer was found to have violated the NLRA when it offered replacement workers a higher starting wage than it had proposed to the union in negotiations. No strike violence had occurred or even been threatened. Thus, in neither case was the employer found to have violated the Act by temporarily changing working conditions in response to actual and threatened strike violence.

The majority's holding at best implies that employer protection of nonstriking employees in the face of actual and threatened violence must be absolutely minimal. Such a rule forces an employer, who is faced with a strike, to try to second-guess the Board's eventual determination (made with the aid of hindsight) of what minimal protection could have been offered.

Dated: September 22, 1981

JOHN P. McCarthy, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint which alleged that we had violated the law. After a hearing was held at which each side had a chance to present evidence, the Agricultural Labor Relations Board found that we unlawfully changed our wage rates, vacation policy, and room-and-board policy without bargaining with the United Farm Workers of America, AFL-CIO (UFW), and unlawfully attempted to bargain directly with our employees by our letter offering higher pay for leaving the 1978 strike.

The Board has told us to send out and post this Notice. We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law that gives you and all California farm workers these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to try to get a contract or to help or protect one another; and
6. To decide not to do any of these things.

Because this is true, we promise you that:

WE WILL NOT change your wages, our vacation policy for employees, or our room-and-board policy without first notifying the UFW, as your exclusive representative, and giving the UFW an opportunity to bargain over the proposed change.

WE WILL NOT circumvent the UFW by bargaining directly with our employees through letters or other communication.

WE WILL NOT make personnel policies which discriminate against employees for engaging in union .activity, including strike activity.

WE WILL, upon the UFW's request, rescind the changes in wages, vacation policy, and room-and-board policy that we made on August 26, 1978, and make our employees whole for any economic losses they suffered as a result of the changes.

Dated: PACIFIC MUSHROOM FARM

By: _____
(Representative) (Title)

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California. If you have a question about your rights as farmworkers or about this Notice you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California; the telephone number is (408) 443-3161.

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Pacific Mushroom Farm, a division of Campbell Soup Company (UFW)

7 ALRB No. 28
Case Mos. 78-CE-67-M
78-CE-67-1-M
78-CE-137-M

ALO DECISION

The complaint alleged that Respondent violated the Act by refusing to bargain in good faith and by unilaterally and discriminatorily changing working conditions, including production standards, wages, benefits, and camp rules. The ALO found that Respondent had generally engaged in hard bargaining, dismissing allegations that Respondent failed to comply with information requests or make concessions. As to the alleged changes, the ALO found that either the bargaining was at impasse or the changes were justified as a response to strike activity by Respondent's employees. The ALO therefore recommended that the Board dismiss the complaint in its entirety.

BOARD DECISION

The Board adopted the ALO's rulings, findings, conclusions, and recommendations with a few modifications. The Board rejected the ALO's finding that an impasse had been reached which justified Respondent's unilateral changes in wage rates and certain benefits. The Board concluded that several of the unilateral changes discriminated against strikers and therefore violated section 1153 (c) as well as section (e) and (a) of the Act.

DISSENT

Member McCarthy would dismiss all allegations except the one regarding unlawful denial of vacation pay to strikers. He finds the wage increase to be in keeping with the employer's past practice of regular, nondiscretionary increases and to have been implemented with adequate notice to the union and opportunity to bargain. He finds the letter to employees to be innocuous and the free room-and-board benefit for nonstrikers to be a reasonable response designed to protect nonstriking workers from harm.

* * *

***

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

OF THE STATE OF CALIFORNIA

In the Matter of:	)	
	)	
PACIFIC MUSHROOM FARM, a division of CAMPBELL SOUP COMPANY,	)	Case Nos. 78-CE-67-M 78-CE-67-1-M 78-CE-137-M
	)	
Respondent,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	
	)	

DECISION

FRANCIS FERNANDEZ and
CONSTANCE CAREY, Staff Counsel
Salinas, California
For the General Counsel

MARION STEEG
Salinas, California
For United Farm Workers of America

RANDOLPH C. ROEDER and
RICHARD M. ALBERT
San Francisco, California
For Pacific Mushroom Farm

DECISION

Statement of the Case

ROBERT A. D'lSIDORO, Administrative Law Officer:

This case was heard by me in Santa Cruz, California commencing on September 18, 1978 and terminating on March 22, 1979. The General Counsel (GC) of the Agricultural Labor Relations Board (ALRB) issued a complaint on July 26, 1978, alleging that Pacific Mushroom Farm (PMF) had not bargained in good faith with the United Farm Workers (UFW). PMF filed an answer to the complaint on August 8, 1978, denying any wrongdoing and raising four affirmative defenses. GC amended the complaint on September 18, 1978, and again on February 27, 1979. Exhibit ALRB 11 is captioned Second Amended Consolidated Complaint, and it contains the specific charges with which we are here concerned, Those charges include the following allegations:

"(a) Since on or about January 31, 1978, respondent has refused and continues to refuse to bargain on mandatory subjects of bargaining.

(b) Since on or about January 31, 1978, respondent has unreasonably delayed in providing information in its possession to the UFW.

(c) Since on or about January 31, 1978, respondent has been adamant and continues to be adamant about company bargaining 'principles' without giving the UFW specific reasons therefor.

(d) Since on or about January 31, 1978, respondent has refused to and continues to refuse to present any

counterproposals to the UFW' s bargaining proposals.

(e) Since on or about January 31, 1978, respondent: has engaged in surface bargaining and continues to engage in surface bargaining with no intent to reach a contract with the UFW.

(f) Since on or about January 31, 1978, respondent has refused and continues to refuse to reduce to writing the terms of agreements which were reached by respondent and the UFW during the course of negotiations.

(g) Since on or about May 30, 1978, respondent has repudiated and continues to repudiate understandings already arrived at by respondent and the UFW during the course of negotiations.

(h) Since on or about May 31, 1978, respondent has conditioned bargaining and continues to condition bargaining on the resolution of the unfair labor practice charge of bad faith bargaining filed by the UFW against respondent.

(i) Since on or about July 18, 1978 and continuing to the present, respondent has unilaterally changed the working conditions of its agricultural employees by instituting a new production quota system and a new disciplinary system based thereon without bargaining to impasse or agreement with the UFW;

(j) Since on or about August 23, 1978, respondent through its agents and supervisors including, but not limited to Edward Zoliniak, has bypassed the UFW by bargaining directly with its agricultural employees about terms and

conditions of employment through letters, leaflets and personal contact;

(k) Since on or about August 26, 1978, respondent through letters, leaflets and personal contact by its supervisors and agents, including, but not limited to Edward Zoliniak and Chuck Kroegel, has threatened, coerced and intimidated its agricultural employees who are engaged in an unfair labor practice strike including, but not limited to threatening loss of benefits and employment to strikers, and misrepresenting material facts about the legality of the strike.

(l) Since on or about August 26, 1978, respondent, without bargaining to impasse or agreement with the UFW, has unilaterally changed the working conditions of its agricultural employees who are engaged in an unfair labor practice strike by instituting a new wage rate, new work rules and a new vacation policy in order to retaliate against the strikers.

(m) Since on or about August 27, 1978, respondent, without bargaining to impasse or agreement with the UFW, has unilaterally changed conditions at the housing facility maintained for its employees including, but not limited to changing meal times, limiting access, setting a new rental rate and requiring payment in advance in order to retaliate against resident employees who are engaged in an unfair labor practice strike.

(n) Since on or about August 26, 1978 respondent has engaged in surveillance and/or created the impression of

surveillance of workers while the workers were engaged in protected concerted activity.

(o) Since on or about August 26, 1978, until November 6, 1978, respondent offered employees free room and board if they refrained from engaging in protected concerted activity.

(p) Since on or about August 26, 1978 until November 6, 1978, respondent unilaterally changed the terms and conditions of employment for those employees who worked during the strike by providing them free room and board and other benefits in order to discourage employees from engaging in protected concerted activity sanctioned by the UFW.

(q) Since on or about January 31, 1978, respondent has engaged and continues to engage in a course of conduct to avoid reaching a contract through a totality of circumstances including, but not limited to, the conduct described hereinabove."

Findings of Fact

1. Jurisdiction.

Pacific Mushroom Farm is a wholly-owned subsidiary of Campell Soup Company. It is located in San Mateo County, near the town of Pescadero, along Highway 1. The farm consists of approximately 106 acres, including all buildings, vehicles, machinery, and tools necessary to spawn, grow, and harvest mushrooms.

The mushroom growing and harvesting operation entails

the mixing of compost, placing the compost in growing beds which are Located in large double-tiered houses, spawning of the growing beds, casing the growing beds, harvesting the mushrooms, emptying the beds, and preparing the beds and growing rooms for a new growing cycle.

The harvested mushrooms are sent to Campbell Soup canning facility in Sacramento where they are used in Campbell Soup products. During all relevant time periods, PMF employed approximately 150 to 215 workers.

The parties do not challenge the Board's jurisdiction in this case. Accordingly, I find that the employer (PMF) is an agricultural employer within the meaning of Labor Code Section 1140.4(c), that the employees working for PMF are agricultural employees within the meaning of Section 1140.4(b), and that the UFW is a labor organization representing agricultural employees within the meaning of Section 1140.4(f).

2. The Alleged Unfair Labor Practices.

On September 21, 1977, the ALRB conducted an election at PMF. On October 20, 1977, the ALRB certified the UFW as the exclusive bargaining representative of the workers employed by PMF. On November 10, 1977, the UFW sent PMF a letter dated October 27, 1977 (GC 2), wherein the UFW requested a negotiations meeting with PMF, and referred to enclosures which consisted of a request for information (GC 3), and a noneconomic contract proposal (GC 4). The letter stated that the economic proposal would be prepared after receipt of the information requested.

In a letter to the UFW dated November 17, 1977 (GC 5),

PMF manager, E. K. Zoliniak acknowledged receipt of the UFW's letter and stated that they were in the process of gathering information in response to the UFW's request. He wrote that PMF looked forward to discussions with the UFW and to reaching a mutually satisfactory collective bargaining agreement. He indicated that PMF would contact the person designated by the UFW concerning acceptable dates for the first meeting. Zoliniak sent the UFW request for information and contract proposal to the Director of Employee Relations for Campbell Soup, Paul Holbrook, whose office is located in New Jersey. Mr. Holbrook telephoned Norman Jones, the personnel manager of Campbell Soup's plant in Sacramento (under the jurisdiction of which PMF operates), and they decided that Jones would coordinate the gathering of the information requested by the UFW. Payroll data from the Sacramento plant was compiled, along with much of the other requested information; however, the pesticide data was quite voluminous and required some organization; therefore, on December 6, 1977, Zoliniak sent to the UFW 87 pages of data (GC 6) which did not include requested information regarding pesticides and chemicals, equipment and protective clothing, nonbargaining unit employee benefits, production data, contract rates, and information pertaining to other PMF collective bargaining agreements. The data and information did include the names, job classifications, social security numbers, hire dates, birth dates, and the sex of each employee in the bargaining unit, as well as the names and residences of the spouses of the bargaining unit employees. PMF sent a copy of a booklet given to each of its employees

describing their insurance benefits and a summary of their savings plan and pension plan. Also provided to the UFW were copies of claims paid on behalf of PMF's hourly employees and dependents over the preceding two years and copies of Health and Welfare forms sent by the company to the government. Zoliniak described in his cover letter the benefits provided by PMF, including paid holidays, vacations, jury duty, and housing. With respect to the request for production data, Zoliniak wrote, "We would be pleased to discuss any of the items applicable to our consideration during negotiations. The data requested in your letter does not appear applicable to our type of operation." It should be noted that UFW negotiator David Burciaga testified at the hearing that the request for information and the contract proposal sent to PMF by the UFW were the same as those the UFW ordinarily sent to other agricultural employers, whether they grow mushrooms or not and whether or not they have seasonal operations. A review of the request for information does, indeed, reveal that some of the requests are obviously inapplicable to the PMF operation.

In a letter dated December 8, 1977 to PMF (GC 7), UFW Director of Contract Administration, Gilbert Padilla, acknowledged receipt of PMF's letters of November 17 and December 6. He wrote that UFW Representative David Burciaga would contact PMF regarding "the date on which he can meet to negotiate" and that in the future any additional information should be sent to Burciaga at La Paz-Keene. UFW President Caesar Chavez sent a letter to PMF dated December 12, 1977 (GC 8), acknowledging PMF's letter of

November 17, 1977 and expressing his appreciation for PMF's "desire to reach an agreement and we look forward to our negotiations . "

Regarding the request for pesticide and chemical information, Norm Jones testified at the hearing that during the month of December 1977, an OSHA inspection took place at PMF in which pesticide use was covered. Jones was informed that some of PMF's employees, who were members of the UFW's Negotiating Committee, participated in the inspection tour. Jones testified that under the circumstances, he believed the UFW had sufficient information regarding pesticide and chemical use by the time the first of the 34 negotiating meetings was held.

The first negotiating meeting was held on January 31, 1978, at the Dream Inn in Santa Cruz, pursuant to a telephone call from Burciaga to Jones on January 23, 1978 wherein they mutually agreed to that time and place (see GC 9). The UFW's negotiator was Burciaga. He was assisted by members of the employee Negotiating Committee and a note taker. PMF was represented by Holbrook (Campell Soup's negotiator for all of its collective bargaining negotiations throughout the country), Jones, Zoliniak, Ed Hernan (the Sacramento plant manager), and Felix Vasquez, an accountant at the Sacramento plant. The meeting lasted approximately two and one-half hours. PMF presented its first counterproposal (GC 10). Each party preferred to talk about its own proposal. During the course of the meeting, Holbrook and Burciaga decided that as the negotiations proceeded, they would initial specific articles of a proposal where agreed

upon fully by the parties. There was some discussion of the UFW's hiring hall and good standing provisions. The parties agreed that the first contract would only be for one year. Mr. Burciaga was concerned about "local demands" not covered by the contract, and the need for the parties to address them, e.g., he mentioned that the workers had informed him that the company had recently instituted an alcoholic drinking ban on company property. He also mentioned that he needed information regarding the company's policy that certain employees who did not live on company property were paid an additional 30 cents per hour. The parties arranged for the UFW representatives to tour the PMF facility after the meeting, and they agreed to meet again for further negotiations on March 21, 1978.

Regarding the company's preparations for the first negotiating session, Mr. Holbrook testified at the hearing that he had endeavored to present the company's first counterproposal so as to proceed directly to the essential differences between the parties and to negotiate those differences without unnecessary distraction. He indicated that he did not favor utilizing a particular tactic of some collective bargaining negotiators which involved preparing a proposal or counterproposal that has numerous provisions which the proponent does not deem essential, and which can, during the course of negotiations, be given up in exchange for concessions by the other side. Holbrook said that he preferred to present his first counterproposal containing provisions about each of which he was serious. In order to accomplish that, he reviewed the various contracts that Campbell's had with other

unions throughout the country, taking from them the basic language he felt both parties would desire in a contract. He then sought to tailor that basic language so as to make provisions applicable to the type of operation utilized at PMF, also taking into account that PMF is governed by the Agricultural Labor Relations Act. Holbrook then reviewed the UFW proposal to see if there were any provisions that PMF could agree to at the outset, thereby avoiding any unnecessary bargaining between the parties. He indicated that he edited some of the UFW proposals which were otherwise unobjectionable. For example, he deleted what he felt was superfluous language in the preamble clause of the UFW s proposal in drafting PMF's counterproposal. Provisions of the UFW's first proposal (GC 4} which Mr. Holbrook endeavored to effect in PMF's first counterproposal (GC 10) included the following: The recognition clause, including Section 1.5, which appears to be taken verbatim from the UFW proposal (Article 1, paragraph C); maintenance of membership in the UFW as a condition of employment; dues checkoff; the inclusion of language that the "company will not interfere with the right of employees to become members of the union" (Section 2.1), which was similar to the UFW proposal (Article 1, paragraph D); inclusion of language that PMF would not "take any action to disparage, denegrate, or subvert the union" nor would it promote any competing labor organization (Section 2.2), which was similar to the UFW's Article 1, paragraph E); UFW access to PMF, as long as it was reasonable and notice was given; a seniority system; a posting requirement and challenging system for a seniority list; notice to the UFW of

layoffs; a grievance and arbitration procedure; a nondiscrimination clause approved by the EEOC; a provision for a UFW bulletin board; and a clause allowing federal and state income tax deductions.

Mr. Holbrook testified that in drafting PMF's first counterproposal, he chose not to exercise his right to withdraw any of the existing benefits already available to PMF employees, and that it was his belief that the UFW could accept everything in his first counterproposal because other unions with whom Campbell had contracts had accepted similar provisions.

After adjourning the first bargaining session, which had been amicable and productive, the UFW representatives toured PMF, and the following day (February 1, 1978), PMF sent to the UFW information concerning contract work which had been requested during the first meeting (GC 11). PMF's transmittal letter endeavored to explain the information that was set forth in the production records, and invited UFW negotiator Burciaga to call upon PMF's Mr. Zoliniak if he had any questions.

The parties had 33 more negotiating sessions during the succeeding months until they were successful in their mutual efforts to enter into a collective bargaining agreement. The two year contract (R 14) was agreed to on November 3rd, ratified by the workers, and signed by the parties on November 6, 1978.

It is not necessary to discuss each of the succeeding 33 bargaining sessions and the many counterproposals in detail nor is it necessary to make findings regarding the evidentiary facts pertaining to each of those sessions and counterproposals. The ultimate fact is that in view of the totality of circumstances

related to both parties' bargaining conduct, I find that there was a good faith effort by both parties to reach a collective bargaining agreement. Both parties expended substantial time and effort to achieve that goal. Both parties engaged in "hard bargaining" regarding various provisions they sought to include in or exclude from the anticipated contract. Both parties, as frustrations mounted, endeavored to apply pressure to soften resistance. For example: After eight bargaining sessions and the exchange of several written proposals and counterproposals, the UFW filed an unfair labor practice charge against PMF on May 24, 1978, alleging that PMF was not bargaining in good faith with the UFW; after the thirteenth bargaining session and the exchange of several more written proposals between the parties, a workers' petition to PMF, a UFW threat of a boycott of Campbell Soup's products, and a drop-off in mushroom picking efficiency, PMF promulgated a written memorialization of its picking production guidelines and a related picking efficiency procedure (R 8), which was presented to and discussed with the workers and the UFW on July 18 and 19, 1978; after the fourteenth bargaining session and another counterproposal, the UFW filed an amendment to its unfair labor practice charge, alleging that PMF unilaterally changed the working conditions by virtue of its having instituted the aforementioned picking productivity system, thereby refusing to bargain in good faith; subsequent thereto, the parties exchanged additional written counterproposals, and at the twentieth bargaining session, on August 23, 1978, the union walked out, and sanctioned a previously threatened strike which commenced at

approximately 9:30 a.m. on August 26, 1978, and lasted until the contract was signed on November 6, 1978; immediately after the strike was declared, all of the hourly employees left PMF property; a picket line was formed and continuously maintained around the perimeter of the farm; within a day of the strike, salaried employees from other Campbell Soup facilities arrived at the farm to perform operational tasks; PMF implemented changes in the camp rules (many male employees lived in barracks on the farm), banning the possession of firearms and the use of alcoholic beverages (employees' living quarters and lockers were searched), the striking employee residents had to display newly-issued identification cards when passing through the entrance to the farm, no guests were allowed, employees were required to pay cash for meals and rent of $16 per week in advance, certain areas in the camp complex where restricted to striking employees, time limitations were imposed regarding employees' use of the camp's eating and bathing facilities; striking employees were no longer provided a breakfast meal; PMF refused to pay vacation pay to striking employees while they were not on the active payroll; sometime between August 28 and September 5, 1978, PMF granted pay raises to its hourly employees working subsequent to August 26, 1978 (see GC 79); on September 8, 1978, the UFW filed additional unfair labor practice charges against PMF; PMF filed an action in the San Mateo County Superior Court seeking an injunction against the UFW; PMF took pictures of the picket line activity which were utilized, according to PMF's representatives, in support of its injunction request; after the twenty-third

negotiating session (negotiations had resumed on September 151, the UFW again threatened PMF with a national boycott of Campbell Soup's products. After 11 more negotiating sessions, the parties reached agreement, the contract was signed, the strike ended, and the camp rules instituted during the strike were rescinded.

The facts set forth above include my findings in this case. I will proceed to analyze those facts, amplify them and make further findings where appropriate, and discuss some of them in greater detail in the succeeding section of this Decision wherein I set forth each specific allegation contained in General Counsel's complaint, analyze it, and come to a conclusion.

Analysis and Conclusions

A. Did Respondent refuse to bargain on mandatory subjects of bargaining?

General Counsel has failed to prove this charge, and it is therefore dismissed. I find that Respondent did bargain on all mandatory subjects relevant to the parties' negotiations, such as union security, hiring, seniority, leaves of absence, grievance and arbitration, wages and fringe benefits, etc. In NLRB v. American National Insurance Co., 343 U.S. 395, 404 (1952), the Supreme Court said, "The Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his positions." In the case at hand, there were 34 negotiating sessions, during which the parties discussed, at great length, all mandatory subjects of bargaining, as well as permissive subjects (local issues were of great concern to employee members of the UFW negotiating team). The

Agricultural Labor Relations Act (ALRA) imposes on employers and unions the duty to bargain collectively in good faith with each other (see Sections 1153 (c) and 1154 (c)). Labor Code Section 1155.2(a) defines the duty to bargain in good faith as the performance of the mutual obligation of the parties to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder, but such obligation does not compel either party to agree to a proposal or require the making of a concession. NLRB v. George P. Pilling and Sons Company, 119 F2d 32, 37, 8 LRRM 557 (3rd Cir. 1941), stipulates, "There must be common willingness among the parties to discuss freely and fully their respective claims and demands, and when these are opposed, to justify them on reason."

In this case, both parties attempted to be firm on many of their positions, but both parties did, indeed, discuss with reasonable amplitude all mandatory subjects of bargaining, proffering their claims, demands, and reasons therefor.

B. Did Respondent unreasonably delay in providing information in its possession to the UFW?

On this issue, the evidence preponderates in favor of Respondent, and therefore the charge is dismissed. PMF responded with reasonable promptness and diligence to the UFW's initial written request for information. PMF's 87 pages of information and data and the summary booklets regarding the company's insurance benefits, savings plan and pension plan were sent to the UFW

eight weeks prior to the first negotiating session. The UFW's initial information request was in the nature of a form request that the union ordinarily sent to all companies. Under the circumstances, some of the requests were not relevant to the PMF operation. General Counsel contends that Respondent was dilatory in providing the union with the information it needed to bargain intelligently; however, I find that PMF's response to the union's requests for information throughout the bargaining relationship was not unreasonable under the circumstances. The law does not require an employer to provide information sought by a union during negotiations in written form. The information may be provided during the bargaining sessions themselves. See Inter-Polymer Industries, Inc., 196 NLRB 729, 762 (1972). Also, an employer may satisfy its legal requirements to provide information by simply making documents available to the union for copying. Cincinnati Steel Casting Co., 86 NLRB 592 (1949). In the case at HAND, PMF's negotiators and staff made reasonable efforts to comply with the union's information requirements. UFW representatives were given the opportunity to and did tour the farm at length more than once, asking questions and receiving answers regarding the operation. PMF expended considerable man hours in supplying information to the UFW, in writing, orally, and visually. UFW negotiator Burciaga testified at the hearing that the company always responded to his questions and provided the information that was requested. PMF did refuse to respond to the UFW's request for information regarding benefits for individual nonbargaining employees. However, Respondent was not

legally required to furnish that information. No presumption of relevance attaches to a request for information regarding employees outside the bargaining unit. General Electric Co., 199 NLRB 286, 288 (1972). Under the NLRA, information concerning nonunit employees is usually deemed relevant only when there is a showing of some interchange between unit and nonunit employees, or where there is an indication that nonunit employees are performing unit work. Brooklyn Union Gas Company, 220 NLRB 197 (1975); NLRB v. Goodyear Aerospace Corp., 388 F.2d 673 (6th Cir, 1968). In NLRB v. Western Electric, 559 F.2d 1131 (8th Cir. 1977), the court held that there was no violation of NLRA Section 8(a)(5) for failing to provide information concerning nonbargaining unit employees where the transfer of unit employees to that group was not imminent. Connecticut Light and Power Company, 220 NLRB 967 (1975), held, "Where a union requests information pertaining to individuals not in the bargaining unit, it bears the burden of establishing that the information is necessary and relevant for purposes of bargaining for employees in the bargaining unit." In our case, that burden has not been met. Our case is distinguishable from those in which the union sought information on nonunit employees because of an indication that the employer was eroding the bargaining unit. (For example, see Temple-Eastex, Inc., 228 NLRB 203 (1977) and the General Electric Co. case cited earlier.) Nor was our case one in which the information was required to substantiate a union's belief that the employer was subcontracting work in violation of the contract. Fawcett Printing Corp., 201 NLRB 964 (1973).

PMF provided the UFW with descriptions of its benefit plans in both English and in Spanish. The circumstances did not require PMF to submit to the Union individual benefit information for all of its nonbargaining unit employees.

C. Was PMF adamant about company bargaining principles without giving the UFW specific reasons therefor?

The transcripts covering the 50 days of hearing in this case include a substantial amount of testimony regarding PMF's assertion of its principles in opposition to certain UFW proposals such as union shop or the good standing clause. I find that PMF, in all cases, adequately specified the reasons for its position. In Church Point Wholesale Grocery Co., Inc., 215 NLRB 500 (1974), the employer repeatedly stated that it opposed union security on the basis of "principle" and that it would not agree to anything which might force employees to join the union. It also firmly opposed dues, checkoff and the union's seniority proposal. The Board ruled that in view of the fact that the employer had made concessions in other areas, the refusal of the employer to recede from its firmly-held principles against union security, checkoff, and seniority could not be equated with bad faith bargaining. Similarly, in WCUE Radio, Inc., 209 NLRB 181 (1974), the employer consistently rejected the union's request for a union shop or an agency shop, explaining that it was opposed to union security provisions as a matter of principle. The Board found that the employer was engaged in hard bargaining and that its uncompromising position with respect to certain issues did not amount to bad faith bargaining. In Frick Co., 161 NLRB 1089 (1966), the Board

found that there was no refusal to bargain based on the employer's statement that the company was "fundamentally opposed" to a union shop, even though the company had aired its adamant position in the local newspaper. See also, McCulloch Corp., 132 NLRB 201 (1961). In the case before us, PMF made numerous concessions during the course of bargaining in areas including union security, the grievance procedure, health and safety, family housing, vacation policy, the discrimination clause, and the hiring procedure. PMF had the legal right to assert its principles to impasse without violating the Act on mandatory subjects of bargaining, including union security, hiring, and the administration of benefit plans. See NLRB v. American National Ins. Co., 343 U.S. 395 (1951).

During negotiations, the UFW adopted a firm posture with respect to various subjects, including the union shop, the good standing clause, a hiring hall, workers' security, and adoption of its own medical plan, penion plan, and the Martin Luther King Farmworkers' Fund. I note that the NLRB has stated that the union's own conduct is a relevant factor in determining whether an employer has engaged in surface bargaining rather than lawful hard bargaining. See WCUE Radion, Inc., supra; Unoco Apparel, Inc., 208 NLRB 601 (1974); Continental Nut Co., 195 NLRB 841 (1972). In the Unoco Apparel case cited above, the Board concluded that the company, which had made concessions to the union, but which stood firm with respect to financial matters, had not engaged in surface bargaining. This charge is dismissed.

D. Did Respondent refuse to present any counterproposals to the UFW's bargaining proposals?

The evidence clearly established that PMF submitted its first written counterproposal to the UFW at the first negotiating session on January 31, 1978. It submitted its second counterproposal on May 3, 1978, its third counterproposal on June 5, 1978, and additional written counterproposals on July 12, August 15, 18, 19, 20, 23, October 12, 14, 18, 24, 25, 26, 27 and November 2, 1978. The counterproposals were reasonably responsive and timely under the circumstances of this case. The evidence preponderates in favor of Respondent on this issue, and therefore the charge is dismissed.

E. Did Respondent engage in surface bargaining with no intent to reach a contract with the UFW?

Where an employer is charged with failing to bargain in good faith, the issue is whether the employer bargained with a sincere attempt to adjust differences and reach a common ground of agreement. This determination must be based on reasonable inferences drawn from the totality of conduct evidencing the state of mind with which the employer entered into and participated in the bargaining process. NLRB v. Insurance Agents International Union, 361 U.S. 477, 45 LRRM 2704 (1960). The yardstick laid down for measuring "good faith" is not rigid, but necessarily has meaning only in its application to the particular facts of a particular case. NLRB v. American National Insurance Company, 343 U.S. 395, 30 LRRM 2147 (1962).

In our case both General Counsel and Respondent stressed

totality of conduct as the standard to which we should measure the good faith of Respondent with respect to PMF's negotiations with the UFW. Indeed, it is well settled that totality of conduct of the parties is the standard by which the negotiations are tested. NLRB v. General Electric Company, 418 F2d 736 (2nd Cir. 1969), cert den, 397 U.S. 965 (1970); NLRB v. Stevenson Brick & Block Co., 393 F2d 234 (4th Cir. 1968); WCUE Radio, Inc., 209 NLRB 181 (1974).

In the case of Midwest Casting Corp., 194 NLRB 523 (1971), the Board's decision on the issue of bad faith negotiating was based upon a scrutiny of the overall context within which the bargaining occurred. In that case the company had withdrawn its entire counterproposal from the table midway through the negotiations because it had become frustrated with the union. The company subsequently reinstated its counterproposal. The Board dismissed the charge, adopting the trial examiner's finding that "in overall context, we do not regard the company's withdrawal of its entire contract proposal . . . as a refusal to bargain or as evidence of bad faith bargaining. ... In bargaining, parties frequently resort to various ploys but such moves must be appraised in overall context." (194 NLRB at 531.) In the case of Webb Pump & Supply, Inc., 167 NLRB 224 (1967), the Board refused to focus on the events of one bargaining session wherein the employer made no proposals and stated that the "union could strike until hell freezes over." (167 NLRB at 226.) In view of the fact that negotiations between the parties subsequently resumed, and in light of evidence that the employer had made economic concessions

and had submitted requested information to the union, the bad faith bargaining charge was dismissed as groundless. The facts of WCUE Radio, Inc., supra, and our case include some similarities. Both cases deal with the negotiations of a first contract between the union and the company. In WCUE the negotiations span an eight-month period commencing during a brief meeting in September 1972, at which time the union presented a proposed contract to the employer. The parties met again on October 18, 1972, at which time the employer's negotiator commented that the union's proposed contract appeared to be more appropriate for a large broadcasting company than for a small one like respondent's, and further observed that the union had shown no awareness in its proposal of respondent's specific operational procedures and practices (209 NLRB at 182-183).

In our case, in November 1977 the UFW presented to PMF a proposed contract which was similar to contract proposals the UFW had sent to other agricultural employers, and which appeared to be more appropriate for a seasonal operation, which was not appropriate for PMF's mushroom growing operation.

In the WCUE case, the company negotiator told the union that he would draft a counterproposal; however, on November 22, 1972, he wrote to the union that:

> "To draft a proposal to the monstrosity you proposed to the Company is a considerable undertaking. You are apparently not sincerely interested in the particular situation of WCUE, and I am not interested in spending my time and WCUE's money in doing your work. Hence, pursuant to your request, we will schedule a meeting with you and tell you what is wrong with your proposal and you can draft a modified proposal to meet WCUE's situation." 209 NLRB at 183,

Although the parties met twice more during December, it was not until January 13, 1973 that WCUE presented its first written counterproposal. Despite the approximate two-month delay in presenting its counterproposal, the NLRB dismissed the refusal to bargain and surface bargaining charges against WCUE Radio, and adopted the finding that in light of the entire course of the negotiations, which included a number of company concessions, the employer's conduct did not amount to bad faith bargaining.

In the case at hand, PMF negotiator Paul Holbrook told the UFW at the negotiating session on May 17, 1978 that he could not respond to the UFW's 57 page proposal submitted on May 9, 1978 (GC 20); however, PMF furnished a third counterproposal less than three weeks later on June 5, 1978, which the UFW preferred not to discuss at the next negotiating session on June 29, 1978. Other than this brief period, I find that PMF diligently submitted appropriate counterproposals to the UFW, and that PMF manifested a willingness to, and did indeed, meet with the UFW on a reasonably regular basis, and that PMF negotiators reasonably endeavored to explain to the UFW why PMF was taking certain positions and, moreover, that PMF made reasonable significant movement on many of its positions.

PMF engaged in hard bargaining, as did the UFW, with respect to certain issues about which it felt strongly, e.g., union shop, good standing, administration of benefit plans, but the preponderance of the evidence is that PMF did not adopt a take it or leave it bargaining posture with respect to its contract proposals. Following submission of its original proposal

on January 31, 1978, PMF submitted numerous counterproposals containing significant movement in such areas as leaves of absence, union security, wages, the grievance and arbitration procedure, vacation policy, the discrimination clause, the recognition clause, hiring procedures, income tax deductions, health and safety, and family and seniority provisions.

I do not agree with General Counsel's assertion chat PMF was dilatory in its tactics and that it was engaging in surface bargaining for the purpose of undermining the UFW’s position with PMF's employees. The evidence at the hearing established that as early as December 22, 1977, PMF negotiator Paul Holbrook sent to PMF's vice-president of personnel an analysis of the UFW’s initial proposal and a preliminary draft of PMF's initial proposal, so that they could be reviewed. Whereas the UFW’s initial proposal was its standard form contract proposal which contemplated a seasonal operation, Mr. Holbrook's proposal was specifically drafted for the type of operation that existed at Pacific Mushroom Farms. There may have been some problems with respect to mutually satisfactory negotiation meeting dates and preparation for upcoming negotiation sessions during the 10-month period of negotiations in our case; however, those problems, more often than not, were caused by the inability of both parties' personnel to devote themselves vigorously, on a full-time basis, to the rigorous mental and physical demands of the collective bargaining process in this case. The evidence preponderates in favor of the conclusion that Respondent made a good faith effort to reach an agreement with the UFW and that it went at least half

way in the give and take of that process.

General Counsel argues in its brief that Respondent "created a negative bargaining atmosphere;" however, based upon my observations of the witnesses and scrutiny of the voluminous documents presented during the 50 days of hearing in this case, I am convinced that Respondent neither intended nor, in fact, created such an atmosphere. There may very well have been some aggressive and even hostile exchanges at some of the long, and sometimes frustrating negotiating sessions, but, I am persuaded that Respondent's representatives went at least half way in their efforts to be accommodating and to reach a mutually satisfactory collective bargaining agreement with the UFW. Cinder the circumstances, this charge is dismissed.

F. Did Respondent refuse to reduce to writing terms or agreements which were reached by Respondent and the UFW during the course of negotiations?

The facts in this case establish that PMF negotiator Holbrook and UFW negotiator Burciaga decided at the first bargaining session on January 31, 1978, that as the negotiations proceeded they would initial specific articles of the proposal where agreed upon fully by the parties. During the succeeding 33 negotiating sessions, there were occasional periods of frustration and acrimony, but I found little convincing evidence that Respondent did not, in good faith, attempt to adhere to that promise. ALRA Section 1155.2(a) specifies that a violation of the Act occurs when a party refuses to execute a "written contract incorporating any agreement reached if requested by either party, but such

obligation does not compel either party to agree to a proposal or require the making of a concession." As indicated earlier in this Decision, the parties did execute a written contract incorporating their agreement. At one point during the negotiations, the UFW suggested that the parties put their disagreements in writing. Respondent declined. There was some evidence that Respondent refused to initial portions of some of the various proposals and counterproposals without first reaching agreement on an entire section; however, I find that the totality of the conduct of Respondent was such that those isolated incidents did not constitute bad faith on the part of Respondent within the meaning of the Act. Under the circumstances, this charge is dismissed.

G. Did Respondent repudiate understandings already arrived at by Respondent and the UFW during the course of negotiations?

General Counsel has failed to present sufficient evidence to support this charge; therefore it is dismissed. As indicated earlier in this Decision, during the long and rigorous bargaining process in this case, there were some problems encountered by both parties with respect to accommodating each other regarding scheduling of meetings, presentation of proposals, etc.; however, there were as many, if not more, instances where the UFW found it necessary to change or cancel a negotiating session and/or failed to produce a document it had promised and/or changed its mind regarding the topic of discussion at a negotiating session.

H. Did Respondent condition bargaining on the resolution of the unfair labor practice charge of bad faith bargaining by the UFW against Respondent?

The evidence presented on this issue included the following: The parties had a negotiating session on Friday, September 15, 1978, Saturday, September 16, 1978, and Sunday, September 17, 1978, which was the day before this hearing was scheduled to commence. PMF's chief negotiator Holbrook was required to leave the negotiating session on September 17 in order to meet with legal counsel to prepare for the hearing, so he left Mr. Jones to continue bargaining with the UFW representatives. After Holbrook left, Jones told the UFW negotiators that he needed some time to study the situation to see if they could come up with something. He pointed out that it was a shame that there were 218 people out on strike, that there was a period of two to three weeks coming up during which the parties would be tied up in the hearing, and he suggested that the charges be dropped, that they get the people back to work, and get a contract. There was no evidence that PMF ever conditioned further negotiations on the dropping of the charges. In fact, PMF negotiating personnel cancelled pre-hearing conferences with their legal counsel in order to bargain through the weekend immediately preceding commencement of the hearing. Later, during the course of the hearing, PMF agreed to periodic hearing recesses in order to negotiate. During the intensive negotiations in October at union headquarters in La Paz, Mr. Holbrook mentioned to Mr. Chavez that he assumed the charges would be dropped if a contract was agreed

upon. Mr. Chavez responded that he did not know about the charges, and that he would have to check with his attorneys. Mr. Holbrook continued to negotiate in the succeeding days and did not reassert his concern about the pending charges. There was credible evidence that Caesar Chavez, when told that some PMF employees believed contract settlement was being held up because PMF wanted the charges dropped, clarified that as far as he (Mr. Chavez) was concerned, that was not the case and that he would straighten out the misunderstanding. The evidence compels me to conclude that this charge be dismissed.

I. Did Respondent unilaterally change the working conditions of its agricultural employees by instituting a new production quota system and a new disciplinary system based thereon without bargaining to impasse or agreement with the UFW?

The evidence on this issue established that for many years PMF maintained a production target for mushroom picking of approximately 45 to 50 pounds of mushrooms per hour. PMF maintained a record-keeping system and, where remedial action was warranted, it counselled low-achieving workers. During the weeks preceding July 18, 1978, PMF personnel became aware of a drop-off in mushroom picking production. In response to that drop-off, PMF promulgated a written memorialization of the production guidelines which had previously been informally in effect. The man who drafted the written document (bilingual personnel supervisor Chuck Kroegel) testified credibly that he attempted to put in written form the procedure that had been explained to him at the beginning of his employment with PMF in August 1977. He also

sought input from farm management personnel at the time he drafted it. The original memorialization was drafted on July 15 (R 8) and given to two UFW negotiating committee members on July 18 and discussed with the UFW at the negotiating session on July 19, at which time the UFW representatives offered suggestions which were implemented by PMF. For example, a UFW negotiator suggested a double-card punch system so that the worker would know his production status, and the company implemented that suggestion. Based upon employee and UFW input, PMF produced a second memorialization of the efficiency procedure (R 9) which endeavored to amend R 8 to conform to the product of the parties' discussions regarding the system. At the next negotiating session on August 15, 1978, the UFW did not mention the efficiency procedure system nor at any subsequent meeting was the issue raised by the UFW.

There was no evidence in this case that the promulgation of the written procedure had an actual impact on the working conditions or the workers at PMF. I find that PMF did not violate the Act nor did it undermine the bargaining strength of the UFW by its having codified in writing its informal past practice regarding production efficiency. In Stratford Industries, Inc., 215 NLRB 682, 686 (1974), an employer's posting of changed holiday working hours did not violate the NLRA when the change substantially conformed with past practice. Pacific Diesel Parts Company, 203 NLRB 820 (1973), Bates Plywood Co., Inc., 174 NLRB 1096 (1960), and Mississippi Steel Corp., 169 NLRB 647 (1968) support the proposition that when employer actions have no real

impact on work conditions, such actions do not violate the law.

In Wald Manufacturing Company, 176 NLRB 839 (1969), the employer was held not to have violated Section 8(a)(5) when it changed its production averages to correspond with new wage rates where the change was in line with past practices and did not increase the production required of employees in order to meet the new wage rate. In Durfee's Television Cable Co., 174 NLRB 611 (1969), the employer did not-violate Section 8(a)(5) by not bargaining over implementation of production standards where the union never effectively requested production, bargaining, and, indeed, appeared to have acquiesced.

The evidence supports Respondent's argument that its written memorialization of its production target represents merely flexible guidelines, not rigid quotas. Although the written guidelines suggest that a worker be counselled if he falls below an average of 45 pounds per hour for more than three days in a week, the actual practice is apparently more lenient. In practice, it is only if a worker falls below the target average for two weeks that the worker is counselled and placed in a training group. The records in evidence show that production efficiency has increased since the implementation of the system (R 31). The evidence established that although the procedure was placed into writing in July of 1978, PMF has yet to issue a warning notice.

In Matlock Truck Body & Trailer Corp., 217 NLRB 347 (1975), the Board ruled that a company did not commit an unfair labor practice when it unilaterally established a new production

quota. The foreman informed the employees that they were to increase their production from three truck sides per shift to five sides per shift, and he warned the employees that any who did not wish to cooperate should look for other jobs. The Board found that this new production quota represented a target for the workers and ruled that the employer had the right to establish such a target.

General Counsel has failed to prove by a preponderance of the evidence that the written guidelines promulgated by PMF in July of 1978 represent an illegal unilateral act. Firstly, the evidence does not preponderate in favor of the conclusion that the written guidelines effected a significant change; secondly, the evidence supports the conclusion that the written guidelines have not been adhered to rigidly and that they merely establish a target, and the fact that no warning notices have been issued belies any assertion that PMF was seeking to undermine the UFW's position with its employees. The formalization of the guidelines was in response to a picking production drop-off, and the matter was discussed on several occasions prior to July 19, 1978, including March 21, 1978, May 3, 1978, and on April 12, 1978, when the UFW proposed in its local demands (GC 14, page 5) that the record-keeping system cease. PMF rejected the demand and the UFW dropped it in its next proposal (GC 20, under Picking). Additionally, the picking efficiency system was included in PMF's work rules (GC 26, item 2(n)), which the UFW accepted. All of the above supports the conclusion that even if the written memorialization were construed to be a "change", the amount and

quality of the dialogue between PMF and the UFW regarding it compels the conclusion that PMF did not violate the Act. See Jefferson Chemical Company, Inc., 200 NLRB 996 (1972). This charge is dismissed.

J. Did Respondent bypass the UFW by bargaining directly with its agricultural employees about terms and conditions of employment through letters, leaflets, and personal contact?

The NLRB has condemned communications by an employer which attempt to bypass the union and deal directly with the employees, or which have the purpose of disparaging the union and undercutting its bargaining strength; however, an employer is not forbidden to respond to questions from employees concerning what has transpired at the bargaining table. See General Electric Co., 199 NLRB 286 (1972).

PMF farm manager Zoliniak responded in writing to a petition and letter from the workers prepared under the auspices of the UFW dated June 3 and 4, 1978 (GC 29) in a letter dated June 8, 1978 (GC 30) and a subsequent letter dated June 23, 1978 (R 5). UFW negotiator Steeg testified that she saw both of those letters from Zoliniak before the next negotiating session on June 29, 1978, and at that time, she objected to neither of them nor to the fact that the company was responding directly to the workers' communications.

On September 6, 1978, PMF's chief negotiator Holbrook sent a letter (GC 55) to a negotiating committee representative in response to the petition of the committee dated August 29, 1978 (GC 52), which had been prepared by UFW representative

Steeg. At the next negotiating session between the parties on September 15, 1978, neither Ms. Steeg nor any other representative of the UFW or the workers objected to the letter or to the fact that Holbrook was responding directly to the Negotiating Committee representative.

The content of both letters from PMF was informative with respect to the company's position, and they endeavored to respond to the written communications to the company from the workers. The company letters did not attempt to bargain directly with the employees. The letters did not disparage the UFW nor did the company offer workers special benefits for abandoning the strike nor could they be understood as threatening or intimidating to the employees. ALRA Section 1155 provides that an agricultural employer has the right to express its views or opinions to the employees provided that such expression contains no threat of reprisal or force or promise of benefit.

General Counsel presented some evidence regarding oral statements made by PMF bilingual personnel supervisor Kroegel to UFW negotiating committee president Salvadore Amezquita. The statements were made on a Saturday afternoon, within the last two weeks of the strike. Kroegel was talking to some of the striking workers, including members of the Negotiating Committee at the entrance to the farm. Mr. Amezquita testified that Kroegel said at that time the only thing holding up a contract was a dispute over UFW proposals called "Martin Luther King, Jr. Farmworker Fund" and "Citizenship Participation Day." Amezquita stated that there were other things which were still pending, and a brief

discussion ensued in the presence of approximately 15 striking workers on that issue.

The evidence established that the UFW negotiated with PMF by using its own staff negotiators, as well as a Negotiating Committee comprised of approximately 50 PMF employees. Additionally, employees who were not Negotiating Committee members were able to be present at negotiating sessions when they so desired. There was substantial dialogue between PMF management personnel and its employees, particularly since the striking employees maintained a 24-hour picket around the farm and many of them lived in the camp on the farm. The evidence General Counsel has presented to support his charge of bypassing the UFW does not tip the scale in his favor. After the many months of communication between the company and its workers via the negotiating sessions, normal social intercourse, and the continuing relationship between the company and its striking employees, the discussion which occurred at the farm entrance between Kroegel and Amezquita during the last stages of the bargaining sessions was not unreasonable under the circumstances and could not have the effect of undercutting the union's strength with the workers nor could it be viewed as an attempt to bypass the union and negotiate directly with the workers. Therefore, this charge is dismissed.

K. Did Respondent through letters, leaflets and personal contact by its supervisors and agents, including, but not limited to, Edward Zoliniak and Chuck Kroegel, threaten, coerce, and intimidate its agricultural employees who were engaged in an unfair labor practice strike, including, but not limited to

threatening loss of benefits and employment to strikers, and misrepresenting material facts about the legality of the strike?

The record in this case does not include convincing evidence supporting this charge; therefore, the charge is dismissed.

General Counsel argues that GC 54 (a letter from farm manager Zoliniak to the workers dated September 5, 1978) violates the ALRA because it specifically offered a wage raise to the employees if they would return to work; therefore, it should be construed as offering special benefits for abandoning the strike. I disagree. This correspondence was in response to written and oral communications from the Negotiating Committee and other employees with respect to the status of the negotiations. Considering the circumstances under which GC 54 was disseminated and its contents, the purpose and the spirit of the ALRA were not violated.

L. Did Respondent, without bargaining to impasse or agreement with the UFW, unilaterally change the working conditions of its agricultural employees who were engaged in an unfair labor practice strike by instituting a new wage rate, new work rules, and a new vacation policy in order to retaliate against the strikers?

As set forth earlier in this Decision, commencing August 26, 1978, PMF employees struck and picketed the farm. Respondent brought in temporary replacements in an attempt to continue operations during the strike, and eventually, several striking employees returned to work. PMF never hired permanent strike replacements.

Sometime between August 28 and September 5, 1978, PMF management made the decision to and did grant a wage increase in accordance with the company's last proposal offered to the Union at the bargaining table on August 23, 1978.

Respondent contends that the wage increase was lawful because it followed a bargaining impasse and, moreover, assuming arguendo, that impasse had not been reached, the implementation of the wage proposal was lawful because it was consistent with past policy and procedure. The evidence compels me to conclude in favor of Respondent on both contentions.

The NLRB has held that impasse is an intangible, flexible concept to be determined by scrutinizing all of the relevant facts of any given situation. Midwest Casting Corporation, 194 NLRB 523 (1971). In viewing impasse as that point in time at which "good faith negotiations have exhausted the prospects of concluding an agreement," the Board and the courts have refused to apply hard and fast formulas and have recognized that "whether a bargaining impasse exists is a matter of judgment." Taft Broadcasting Company, 163 NLRB 475 (1967), aff'd 395 F2d 622 (D.C. Cir. 1968). In Taft, the Board delineated various elements relevant to a finding of a legitimate bargaining impasse.

> "The bargaining history, the good faith of the parties in negotiation, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed." 163 NLRB at 478.

Applying the facts of our case to the Taft criteria I find that a legitimate bargaining impasse within the meaning of

the Act existed between PMF and the UFW as of August 28, 1978. Although PMF and the UFW had no history of bargaining prior to the UFW certification at PMF in October of 1977, they had been hard at it since then.

Regarding good faith, as indicated elsewhere in this Decision, I have concluded that the evidence in this case preponderates in favor of the conclusion that PMF bargained in good faith with the UFW. Bargaining between the parties on economics had been lengthy. On July 19, 1978, the negotiators acknowledged that they had gone as far as they could on language, they moved to economics, and then decided that they would move completely into the question of wages at the next meeting. A proposal and counterproposal on the wage increase were on the table by August 15, and fully discussed then and again on August 17, 18, 19, 20, and 23. Even prior to August, there had been substantial discussion of the 30 cent living allowance related to camp residents, with the union proposing in its local demands of April 12, 1978 that the 30 cents be given to all employees. Under the circumstances, by August 23, 1978, when the Negotiating Committee walked out of negotiations, it was reasonable to assume that the conflicting wage proposals would not be resolved. Thus, as of August 28, 1978, there was definite disagreement between the parties on the important issue of wages. Indeed, despite many months of rigorous bargaining, the parties were unable to reach agreement on other major issues such as the good standing clause, administration of benefit plans, and union security. The last criteria set forth in Taft is "the contemporaneous understanding

of the parties as to the state of the negotiations." Since, according to the Board, impasse is essentially a matter of judgment, we must scrutinize the evidence regarding the perception of the negotiators in our case. Various decisions have found impasse based upon the relevant perceptions of the parties to the negotiations--"what matters is whether the [union] had reasonable cause to believe and did sincerely believe that an impasse had been reached." Cheney Lumber Company v. NLRB, 136 NLRB 235 (1961), enf. 319 F2d 375 (9th Cir. 1973).

During the August 23rd negotiating session, several things occurred which significantly deteriorated the relationship between the negotiators and which reasonably led PMF negotiator Holbrook to entertain serious doubts that the parties would be able to reach agreement. At the beginning of the session, Holbrook expressed his concern over the fact that he could not make further movement on language issues; therefore, he suggested that the parties move toward a discussion of economics. After conferring with- members of the Negotiating Committee, UFW negotiator Steeg emphasized that they were firm in their position on the language issues and that they would not compromise those positions for economics. Her position was not inconsistent with previous bargaining session positions the UFW had espoused. In view of the fact that the UFW's position appeared to be that unless they could reach agreement on language they would be unable to agree, Holbrook reiterated his thought that further negotiations on language would prove futile and he declared that the parties had reached an impasse on language. Subsequently, various members of

the negotiating committee delivered impassioned speeches affirming the UFW's position that there would be no agreement unless there was agreement on language. They thereupon walked out of the negotiating session without making arrangements to reconvene in the future as had been the previous practice of the parties. The content and tone of the impassioned speeches led PMF negotiators to reasonably perceive an uncharacteristic hostility and increased inflexibility on the part of the Union's side of the table. UFW negotiator Steeg remained in the negotiating room after the Negotiating Committee walked out, and told Respondent's representatives that she would endeavor to bring the committee back to the table. She left her things in the bargaining room and proceeded to confer with the committee members in the parking lot of the hotel where the negotiations were in progress. Respondent's representatives waited approximately 45 minutes; however, none of the Union representatives returned to the negotiating session.

The impassioned speeches, the walk out, and failure to return to the bargaining table caused Holbrook to believe that chances of settlement were severely curtailed and that further negotiations would not prove fruitful. The wage offer made by PMF on August 23 was higher than that which the Union had agreed to at West Foods Mushroom Farm at nearby Soquel. The Union's rejection of what Holbrook considered to be a fair proposal further fueled his belief that there was little chance of reaching economic settlement. Additional facts supporting Holbrook's ultimate perception of impasse are that on the day following the walk out, August 24, Holbrook telephoned Steeg's office to

ascertain when and if future negotiations could take place. Ms. Steeg was not at her office; however, Holbrook was assured that she would be given his message to call him back. Holbrook never received a return call.

During the first few days of the strike, Holbrook was advised by Kroegel that comments from the striking employees led him to believe that the union was confident that the company would capitulate. Holbrook testified that these comments deepened his suspicion that the union would not bargain for at least two weeks in hopes of forcing the company to capitulate.

By August 28, 1978, Holbrook concluded that a bargaining impasse had been reached. Major issues remained to be resolved and the union's actions at the August 23rd bargaining session indicated increasing inflexibility. Subsequently, the union made no efforts to continue negotiations, nor were there any indications that they intended to do so. Under the circumstances, it appears clear that Holbrook was justified in his perception of an impasse under Board precedent. "Where good faith bargaining has not resolved the key issues and where there are no definite plans for further efforts to break the deadlock, the Board is warranted [citations omitted] and sometimes even required [citations omitted] to make a determination that an impasse existed." Cheney Lumber, supra. Application of our facts to the legal precedent set forth above compels me to conclude that Respondent reasonably and in good faith believed that an impasse had been reached by August 28, 1978. I note that the UFW Negotiating Committee sent a letter to Holbrook

dated August 29, 1979 which can be construed to be an offer to resume bargaining (see GC 52); however, there was no evidence to contradict Holbrook's statement that he did not receive the letter until September 5th (see GC 55--Holbrook's response to GC 52).

The Board has traditionally and consistently held that an employer may unilaterally institute its wage proposal offer to the union at the bargaining table where the parties have impassed and productive bargaining has ceased. See, e.g., Gulf State Manufacturers v. NLRB, 579 F2d 298 (1978); Continental Nut Company, 195 NLRB 841 (1972); Phil Rich Manufacturing Company, 171 NLRB 586 (1968).

The wage increase implemented by Respondent subsequent to August 28, 1978 had been offered during the August 23 negotiating session. Assuming, arguendo, that impasse was not reached, I note that the evidence established that Respondent traditionally conducted an annual wage review during the month of August. Wage increases had been granted in August of 1976 and August of 1977 (see GC 80). During negotiations with the UFW on May 17, 1978, Respondent indicated that it intended to conduct its annual wage review during August of 1978. At the July 13, 1978 negotiating session, UFW negotiators expressly recognized that Respondent's annual wage review was coming up in August. The 25 cent hourly increase granted during the strike is very close to the average of the wage increases granted in 1976 and 1977.

Board precedent established the right of an employer to implement a unilateral wage increase in accordance with past policy and procedure even while in the midst of employee organizing

activity. In Blue Jeans Corporation, 177 NLRB 198 (1969), the Board approved a unilateral wage increase instituted by the company during negotiations. As in our case, the employer had informed the union of its intentions well in advance and had provided the union adequate opportunity to discuss the increase before it was implemented.

In Jimmy Dean Meat Company, 227 NLRB 1012 (1977), the Board noted that wage increases granted by an employer during the pendency of an election petition were in line with past practice and were therefore lawful. See also Anchortank, Inc., 239 NLRB No. 52 (1978); RB&W Industrial Plastic Products, 184 NLRB 966 (1970); and Arbco Electronics, 165 NLRB 758 (1967). Application of the facts in our case to the above legal criteria compels me to conclude that PMF's wage increase subsequent to the strike was lawful.

Regarding Respondent's promulgation of new work rules, General Counsel has produced insufficient evidence and/or authority to prevail on that charge. The evidence established that Respondent broached the subject of implementing work rules during the negotiating sessions of April 11 and May 3. Respondent's express purpose in promulgating work rules was to eliminate misunderstandings and formalize existing procedures. Although Respondent considered work rules to be an issue encompassed by management rights, it sought input from the UFW as part of its good faith effort to negotiate. The possibility of a joint promulgation of the work rules was discussed; however, the UFW ultimately indicated that it did not wish to be identified with

the implementation of such rules. There was no convincing evidence that the UFW ever specifically objected to the Respondent about the implementation of the work rules.

The NLRB has ruled that an employer may change an existing rule for legitimate reasons if the resulting change has no significant impact on work conditions. Pacific Diesel Parts Company, 203 NLRB 820 (1973). The evidence in our case supports the conclusion that the work rules instituted by PMF did not alter work conditions or requirements. In Clark Truck Lines, 168 NLRB 500 (1967), the employer informed the union during bargaining of its intention to institute work rules which would have little, if any, effect on work conditions. The Board found the employer's actions to be lawful.

Application of the facts in our case to the legal precedents set forth above compels the conclusion that PMF's actions regarding work rules were lawful.

Regarding General Counsel's charge that Respondent instituted a new vacation policy during the strike in order to retaliate against striking employees, I find that PMF's refusal to pay vacation pay to the strikers was consistent with its previous policy of not granting vacation benefits to employees not on the active payroll. Despite the fact that striking employees were not on the active payroll, PMF representatives assured the UFW at the September 15, 1978 negotiating session that no striking employee would lose eligibility for vacation benefits in the event the employee's anniversary occurred during the period of the work stoppage. The evidence presented in this

case was that PMF granted all vacation benefits accrued during the strike after the work stoppage had ended. Regarding PMF's obligation to award vacation benefits during the strike, the NLRB has looked to past practices in determining whether denial of vacation benefits to striking employees is lawful. In Mueller Company, 165 NLRB 508 (1967), the employer refused to award holiday pay to striking employees engaged in a work stoppage over the Memorial Day holiday, claiming that they were not on the active payroll. The Board upheld the employer's actions, noting that:

> "in the absence of proof that the denial of holiday pay was a departure from the terms of employment established by Respondent's contract with the strikers' representative, such denial must be deemed to be part of normal loss of wages incident to a strike and, therefore, not per se discouraging of union membership or activity." See also, Roegelein Provision Company, 181 NLRB 578 (1970).

Respondent's actions as set forth above are consistent with the "legitimate and substantial business justification" criteria which the Board has applied in similar situations (see NLRB v. Great Dane Trailers, Inc., 18 L.Ed. 1027 (1967)). Towne Chevrolet, 230 NLRB 479 (1977) asserts that under the general principle that strikers "are not entitled to compensation for the period they are on strike," denial of benefits to striking employees is lawful absent proof of unlawful discrimination. In Texaco, Inc., 179 NLRB 989 (1969), the employer rescheduled vacation pay and other benefits until after the work stoppage. The Board upheld the employer's actions holding that:

> "I am unable to find that Respondent's conduct with regard to vacations during the strike was so destructive

> of employees' rights or so unrelated to a legitimate business interest as to warrant an inference that Respondent's motives were unlawful." See also, Electro Vector, Inc., 539 F2d 35 (9th Cir. 1976).

In the case at hand, Respondent's actions were not inconsistent with previous policy, which policy reflected a legitimate business consideration. Additionally, Respondent could legally take advantage of its right to withhold compensation from striking employees in the manner and under the circumstances which it did. Therefore, General Counsel has failed to prove that Respondent's refusal to pay vacation pay to striking employees was a violation of the Act.

Based upon all of the above analysis and conclusions, the charges set forth in paragraph L. above are dismissed.

M. Did Respondent, without bargaining to impasse or agreement with the UFW unilaterally change conditions at the housing facility maintained for its employees, including, but not limited to changing meal times, limiting access, setting a new rental rate, and requiring payment in advance in order to retaliate against resident employees who were engaged in an unfair labor practice strike?

It is well settled that an employer may institute reasonable unilateral changes necessary to maintain his operations during a strike. Raleigh Waterheater Manufacturing Company, Inc., 136 NLRB 76 (1962). The Board has consistently found unilateral operational changes to be lawful where they are undertaken pursuant to the employer's right to maintain his operation during a strike.

In Crane Company, 165 NLRB 1003 (1967), a struck employer unilaterally removed parts and dies from his struck facility and diverted them to a different plant. The Board held that the employer was exercising lawful discretion in order to maintain operations during the strike and held his actions to be lawful. See also, Texaco, Inc., supra.

The evidence in the case at hand preponderates in favor of Respondent's position that it was justified in implementing the camp rule changes described earlier in this Decision. When the strike and picket line commenced on August 26, 1978, Respondent was confronted with the unprecedented and awkward situation of having striking employees living and eating on company premises while strike replacements and some returning strikers were also living on the premises and conducting operational procedures. The ostensible conflicting interests of these people at close quarters reasonably justified living and operational changes to minimize hostility and/or crippling effects on the farm's operation. Separate meal and shower times were implemented to accommodate overtaxed facilities and to provide some degree of separation between strikers and strike replacements. Rules banning firearms, intoxicating beverages, and the use of identification cards were not unjustified under the circumstances. Striking employees were denied access to certain areas because strike replacements were living in those locations and striking employees were required to pay cash for meals and for rent because they were no longer earning paychecks from which Respondent could deduct those charges as it had done before the strike.

At the August 23 aborted negotiation session, PMF negotiator Holbrook had indicated his desire to discuss with the UFW the implementation of camp rule changes necessitated by a strike if, in fact, the threatened strike occurred; however, the UFW negotiatiors did not respond to his expression. As indicated earlier in this Decision, Holbrook telephoned Steeg's office on August 24, endeavoring to communicate with the union regarding its future course of conduct; however, his request that Ms. Steeg call him back was not fulfilled.

Under the circumstances of our case, the implementation of housing facility changes was not unreasonable, and was justified within the meaning of the relevant legal precedents. Therefore, this charge is dismissed.

N. Did Respondent engage in surveillance and/or create the impression of surveillance of workers while the workers were engaged in protected concerted activity?

General Counsel contends that PMF management personnel violated the ALRA by regularly perusing the picket line, taking pictures of picket line activities, and by having its bilingual guards move about the perimeter of the camp at night with walkie-talkies.

The facts in this case establish that all of the above events took place; however, the circumstances under which they occurred and the manner in which they occurred do not constitute a violation of the ALRA.

Immediately after the strike began, the strikers established a line around the entire perimeter of the camp,

which was constantly manned by the workers. The entrances and exits to the camp were particularly subject to the picket line vigor. The evidence established that Respondent sought an injunction against certain picket line activity from the San Mateo County Superior Court, and that photographs were taken by Respondent representatives to secure evidence of unlawful strike activity in support of the San Mateo County action. Additionally, there was credible evidence that pictures were taken to document proof of service on the pickets of the injunction against mass picketing and violence that was ultimately issued by the court.

The Board has held that photographing picket line activity in order to secure evidence of unlawful strike activity is lawful. See Cavalier Division of Seeburg Corp., 192 NLRB 290 (1971) and Matlock Truck Body & Trailer Corporation, 217 NLRB 346 (1975).

In the case at hand, the evidence supports the conclusion that Respondent's picture taking of picket line activity was taken to secure evidence of alleged unlawful strike activity, and not a violation of the Act. General Counsel's evidence regarding regular perusal of the picket line by management personnel and/or stealthy activity by the guards was vague and insufficient to establish a violation of the Act. There was no indication that the regular perusal of the picket line and/or the activity of the guards was not reasonable and justified in the normal activities of the people involved given the stressful factors under which they were operating. Under the circumstances, this charge is dismissed.

O and P. Paragraphs (o) and (p) of the complaint overlap. The issues presented therein are did Respondent offer employees free room and board if they refrained from engaging in protected concerted activity and did Respondent unilaterally change the terms and conditions of employment for those employees who worked during the strike by providing them free froom and board and other benefits in order to discourage employees from engaging in protected concerted activity sanctioned by the UFW?

Regarding the alleged offer of free room and board, the evidence established that personnel supervisor Kroegel received inquiries from several striking employees regarding what arrangements would be made if they returned to work. Kroegel responded to them by indicating that they would not be compelled to live and/or eat with the striking employees, and that they would be provided living quarters and food by the company. Thus, the evidence does not support the inference that the company aggressively sought to persuade striking employees to abandon the strike by offering them free room and board as enticement.

The NLRB has held that an employer may grant returning strikers temporary economic benefits where those benefits are related to potential property and personal damages created by the strike situation. In Pilot Freight Carriers, Inc., 233 NLRB 286 (1976), striking owner-operators were permitted to use company equipment free of charge when they returned during the strike. Returning strikers were also permitted double runs. The Board found that returning owner-operators feared damage to their own vehicles during the strike, and the company therefore granted

free use of its own equipment to allow continuation of operations. The Board noted that the free use of company equipment "can be readily attributed to the difficulties related to and created by the strike, and potential property and personal damages flowing therefrom." The evidence in our case established that PMF representative Holbrook received daily reports from personnel supervisor Kroegel and others present at the farm during the strike. On September 8 and 9, Holbrook was informed that the first striker to return to work had been threatened by striking employees and had then discovered green paint on his clothes which had been in his locker in the camp. Holbrook testified that he felt that returning workers might be subject to further strike-related property and personal damages; therefore, he told Norm Jones to provide room and board to the worker who had been harassed and any other workers who wished to return to work in the interest of their safety and welfare. On September 11, 1978, Holbrook reviewed written declarations under penalty of perjury by two returning employees who related threats they had received. Holbrook testified that he then decided it was necessary for the company to strengthen its desire to protect its employees from strike-related harm and therefore decided that no charge would be made for room and board to employees while the strike continued.

Following the reasoning of Pilot Freight, supra, I conclude that PMF was justified in providing free room and board during the strike as a temporary benefit designed to alleviate strike-related fear of property damage or personal harm. Under the circumstances, this charge is dismissed.

General Counsel argues in his brief that Respondent violated the ALRA by supplying free work clothing to strike breakers; however, the evidence in that regard was inconclusive. It does not establish by a preponderance thereof that Respondent specifically offered and/or awarded free work clothing to non-striking employees. General Counsel refers to the case of Barrett-Collins Company, 230 NLRB No. 18, 96 LRRM 1581 (1977), wherein the Board found a refusal to bargain when work gloves were provided to nonstriking employees and gloves had not previously been provided. In the case at hand, there was little evidence upon which to conclude that Respondent had intentionally made gloves and/or other work clothes available to strike breakers that had not been available to and/or used by its regular employees prior to the strike. General Counsel has failed to meet the burden of proof on this issue; therefore, the charge is dismissed.

Q. Did Respondent engage in a course of conduct to avoid reaching a contract through a totality of circumstances, including, but not limited to, the conduct described in the preceding paragraphs of the complaint?

As indicated previously in this Decision, I have concluded that Respondent endeavored to and did, in fact, negotiate in good faith with the UFW in order to reach a contract. I have followed the urging of both General Counsel and Respondent to scrutinize the totality of the circumstances regarding the relationship of the company and the union in this case. General Counsel asserts in his brief that the totality of Respondent's conduct includes distinct periods which show a consistent pattern

of interfering with employee rights to elect and be represented by a union for the purposes of collective bargaining. General Counsel points to an "intensive anti-union campaign" directed by PMF negotiator Holbrook prior to the ALRB election on September 21, 1977, and contends that after the UFW was certified by the Board, "Respondent's tactics, which were always sophisticated, then switched from outright opposition to unionization of its work force to unilateral changes and surface bargaining intended to frustrate agreement." Respondent representatives admit that they did conduct an aggressive anti-union campaign prior to the election, but thereafter they sought to bargain to contract with the UFW without reservation. Indeed, the preponderance of the evidence was that under the totality of circumstances, Respondent's representatives conducted themselves reasonably in preparing for, entering into, and maintaining negotiations with the certified bargaining representative of PMF employees, and that they did so with the sincere intent to reach a mutually satisfactory collective bargaining agreement. Both Respondent and the UFW were hard bargainers in this their first contract, and they both bargained in good faith within the meaning of the ALRA.

RECOMMENDED ORDER

IT IS HEREBY ORDERED that the complaint be dismissed in its entirety.

Dated: August 31, 1979.

AGRICULTURAL LABOR RELATIONS BOARD

By _____
ROBERT A. D'ISIDORO
Administrative Law Officer